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No. 83-1645

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CHARLES STRUEMPH, JOSEPH STRUEMPH,
JOHANNA STRUEMPH, STEVE HOFFMAN,
MARIE HILKE and MARTHA KEMNA,
Petitioners,

vs.

BISHOP MICHAEL McAULIFFE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Forenote: Respondent does not find the Petitioners' Statement of the Case to be satisfactory and, therefore, sets out his own presentation. Respondent's Statement and Argument include specific references to the record before the state court of appeals for the convenience of this Court should it request that the record below be transmitted pursuant to Rule 19.1.

The Parties:

Respondent Michael F. McAuliffe is the Bishop of the Catholic Diocese of Jefferson City by appointment of the Pope (Tr. 151; Dfs. Exh. M, Letter of Appointment of Bishop by Pope).

Reverend Hugh Behan, a defendant in the trial court, was pastor of Holy Family Parish from November 5, 1975, including the years 1977, 1978 and 1979 during which these issues arose, by appointment of Bishop McAuliffe. Later he was appointed pastor of another parish in the Diocese (Tr. 39-40 and 49) and subsequently dismissed as to Count I of the Petition.

Petitioners (Plaintiffs before the trial court) are members of the Catholic Church by Baptism and members of Holy Family Parish, Freeburg, Missouri, by reason of their residing in the geographic area of that parish although those who testified had ceased attending the parish before the dispute over the side altars. (Dfs. Exh. C., Canons 87 and 91; Tr. 40, 63 and 144).

The Parish and Church:

Holy Family Parish, Freeburg, Missouri is a parish of the Catholic Diocese of Jefferson City, having been established by the Archbishop of St. Louis in 1904 and assigned in 1956 to the new Diocese of Jefferson City when the Diocese was established by the Pope from parts of the St. Louis Archdiocese and other dioceses (Tr. 11, 154; Plfs. Exh. 17, p. 12, "Souvenir of . . . Silver Jubilee;" Dfs. Exh. L, papal bull establishing dioceses).

During the late 1800's Catholics in the Freeburg area were ministered to by Jesuit missionaries who were supported by Catholics in Europe (Plfs. Exh. 17, p. 10; Tr. 15-17). In 1903 Archbishop Glennon of St. Louis sent Father Gerald Fick to investigate the possibility of establishing a new parish (Tr. 11; Plfs. Exh. 17, p 12).

The parish property was acquired from Mr. and Mrs. Engelbert Franke in 1904 by Archbishop Glennon and over the years title has descended to his successors in office, the current successor being Bishop McAuliffe (Tr. 157, 165, et seq.; Dfs. Exh. H, I and J, deeds).

Originally there was a small wooden church (Plfs. Exh. 17, p. 12). By 1919 apparently the congregation had outgrown the original wooden church and the pastor, Father Fick, began the drive for a new church (Tr. 11; Plfs. Exh. 17, p 12 and p. 20). Through the "free will offerings" of money and labor by the pastor and parishioners (Plfs. Exh. 17, p. 39) including Petitioner Struempf's ancestors (Tr. 66), the new church was built and was dedicated by Archbishop Glennon in 1921 (Plfs. Exh. 17, p. 23).

In the Sanctuary of Holy Family Catholic Church there are four altars: (1) The Altar of Sacrifice; (2) the old "high" or "main" altar; (3) the Blessed Virgin Mary side altar (left side); and (4) the St. Joseph side altar (right side) (Plfs. Exh. 5, Photo; Tr. 31-33).

The "Altar of Sacrifice" is a free standing altar located in the center of the Sanctuary proximate to the congregation and arranged so that the priest and congregation face each other across the altar table (Tr. 54-55; Dfs. Exh. G, "General Instructions of the Roman Missal", p. 41, paragraph 262; Dfs. Exh. K, "Guidelines for Building or Renovating Churches," p. 5, paragraph 27).

The altar referred to as the old "high" or "main" altar is located against the front wall of the interior in the center (Plfs. Exh. 17, p. 37). A priest saying Mass at this altar would have his back to the congregation (Tr. 161). This altar in the past was the principal altar for the celebration of the Mass and thus was called the main altar. For over a decade the Mass has been celebrated at a different altar (the Altar of Sacrifice) located in the center of the Sanctuary with the priest facing the people.

The side altar referred to as the "Blessed Virgin Mary altar" is located against the wall in the front interior and to the congregation's left (Tr. 32).

The side altar referred to as the "St. Joseph altar" is located against the front interior wall to the congregation's right (Tr. 32).

Prior to the filing of this suit, on each of the tables of these side altars were reredos, ornamental, arched tops against the wall with places for statuary etc. (Tr. 31-32). Petitioners

were unable to testify as to when the reredos were installed (Tr. 74-76).

The Dispute:

The Second Vatican Council (1963-1965) changed the liturgical practices of the Catholic Church. The hierarchy of the Church made the liturgical decision to arrange churches so as to focus attention on the one Altar of Sacrifice and remove or modify things which distract the full attention and participation of the people on the central celebration of the Mass (Dfs. Exh. E, "Instruction on Eucharistic Worship", p. 38, paragraph 72; Dfs. Exh. K, p. 5, paragraph 6 and p. 10, paragraph 57).

Since Vatican II Mass is celebrated only at the Altar of Sacrifice. It is in fact the current main or high altar. In churches constructed since Vatican II there is only this one altar in the Sanctuary. In many churches built before Vatican II the former "main" altar and side altars have been removed (Tr. 20-21). The new Altar of Sacrifice is the center of worship (Dfs. Exh. F, p. 38, paragraph 72; Dfs. Exh. K, p. 1, paragraphs 3 and 4). It is "highly recommended that side altars be removed so that they do not distract from the liturgical unity and centrality of the one Altar of Sacrifice" (Dfs. Exh. K, p. 10, paragraph 57; also see p. 5, paragraph 26 and Dfs. Exh. F, p. 38, paragraph 72).

These changes by the hierarchy were based on the intention to preserve not

only "what our immediate ancestors passed on to us" but also "the entire past of the Church and all its customs" (Dfs. Exh. G, p. 18, paragraph 9).

Implementing the aforementioned liturgical decisions of the hierarchy, the Respondent Bishop and Pastor during 1978 removed the reredos (top part) but not the altar tables (bottom part) of the side altars in Holy Family Church. They also relocated the Altar of Sacrifice moving it closer to the congregation (Tr. 30, 32 and 69; Plfs. Exh. 34 and 35). Plans also included the rearranging of the Tabernacle (a secure cabinet or safe in which the Holy Eucharist or communion bread is kept), religious statues and other articles relating to the worship services.

Prior to implementing these changes the Respondent and pastor informed the parishioners including the Petitioners and consulted with the Parish Council (an advisory body)* on several occa-

* Petitioners state in their Petition at page 4 that "the elder Mr. Struempf was a member of the Board of Trustees, the governing body at that time...." The parish Board of Trustees which existed in the past was always advisory and never had governing authority. (Tr. 112-113). Moreover such bodies were expressly prohibited by Canon Law from interfering in the arrangement of altars. (Tr. 113. Dfs. Exh. C, Canon 1184). The Canon Law has been in effect since 1918 (Tr. 111) and precedes even the construction of the Freeburg Church in 1921.

sions.

On February 20, 1978, the Parish Council recommended, "No changing of the Church" without a vote of the parish (Plf. Exh. 11, p. 2). At the next meeting of the Parish Council the pastor vetoed this decision (Plf. Exh. 13). Other discussions occurred during the regular monthly meetings. On May 15, 1978, the Parish Council met. Bishop McAuliffe attended the meeting and at the beginning of the meeting was presented with petitions (Plf. Exh. 10) addressed to the Parish Council requesting that the altars be left intact (Plf. Exh. 16, p. 1). At the May meeting the Council made the following recommendations:

"1. Use the tabernacle from the high altar and move it to the table of one of the now existing side altars.

"2. Remove the tops only from the side altars and have them properly stored -- not discarded. This would be done because putting the Blessed Sacrament on a now existing side altar with statues on the top was 'not acceptable' as pointed out to the Council at the April meeting by Father Behan.

"3. Use the table of the remaining side altar for Holy Family shrine.

"4. Move the Altar of Sacrifice forward to the bottom step

of the Sanctuary, build a platform (from the bottom step to the second step) the length of the base of the Altar in order to let the rest of the bottom step free on either side of the Altar.

"5. Leave the benches facing the front. None to be removed in front. Large benches removed from the back of the Church to make room for larger vestibule could be cut to size and set at an angle in the area where the small benches are at present. Move small benches as needed in the choir loft."
(Plf. Exh. 16, p. 2)

All of the Council's recommendations were approved by the Pastor with the exception of numbers 4 and 5. It was agreed that they would experiment with the two alternative proposals for the arrangement of the Altar of Sacrifice and the pews (Plf. Exh. 16, p. 3). At a special meeting on August 28, 1978, the Council reaffirmed the compromise proposal approved at the May 15 meeting stating, "The compromise includes very moderate changes in comparison with the originally proposed changes, and so there has been compromise or 'giving in' on both sides." (Dfs. Exh. B)

However, the ultimate decision to make the changes was by Bishop McAuliffe (Tr. 43 to 47; Plfs. Exh. 11, 13, 15 and 16; Tr. 34).

Petitioners oppose the changes in the Sanctuary of the Church and initiated this lawsuit (Tr. 70).

The Proceedings:

On August 28, 1978, Petitioners filed a three count Petition in the Circuit Court (1) seeking temporary and permanent injunctions restraining the Bishop and Pastor from removing the main altar and two side altars and from moving the Altar of Sacrifice located in Holy Family Parish Church in Freeburg, Missouri; (2) seeking enforcement of Respondents' self-asserted "right to conduct the business and government of the said Church" through an accounting of parish funds; and (3) seeking, by declaratory judgment, a decree that Respondents "are empowered with the authority to control the physical changes in the (Church) building and its contents including, but not limited to, the above-described altars" (L.F., pp 1-5).

An ex parte restraining order was issued by the Trial Court restraining the Bishop and Pastor from removing the main altar and two side altars and from rearranging the Altar of Sacrifice in Holy Family Catholic Church (L.F.33). This temporary restraining order was subsequently modified. On September 15, 1978, a new order was entered which enjoined them from removing the main altar, from removing the side altar tops to a place outside the property of Holy Family Catholic Church and from destroying or disposing of the altar tops, and further mandating them to protect,

preserve and store safely the altar tops. The reredos or side altar tops had been removed prior to the filing of the Petition. (L.F. 14, 15, and 33.)

The matter was tried before the Court on December 12, 1980 (L.F. 35) and on June 15, 1982 Judgment was entered permanently enjoining the Appellant Bishop from removing the "main altar from its site in the sanctuary of Holy Family Parish Church" and mandating the Appellants to restore "the complete two side altars with reredos" (L.F. 23-32).

On July 22, 1982 an appeal was taken to the Missouri Court of Appeals, Eastern District. On September 6, 1983 the Court of Appeals issued its opinion reversing the judgment of the trial court. Struempf et al. v. McAuliffe, 661 SW 2d 559, (Mo. App. 1983). On January 17, 1984, the Supreme Court of Missouri denied the Application to Transfer. Subsequently this Petition for Writ of Certiorari was filed.

SUMMARY OF ARGUMENT

The state court's decision is in harmony with the decisions of this court in Serbian and Jones.

The issue is over the arrangement for worship of the altar and the sanctuary of a Catholic Church. This is clearly a matter of liturgy. Under the First and Fourteenth Amendments civil courts are prohibited from interfering in such ecclesiastical matters.

Even if the issue were one of property rights, the Catholic Church is hierarchical and ownership and control of property is vested in the bishop and not the members. Under Jones, a state may adopt a rule of deference to decisions of a hierarchical church.

Even if the "neutral principles approach" of Jones is applied, the deeds and church constitutions and laws clearly reveal that the property is held subject to the control of the hierarchy of the Church and not the Petitioners.

Thus the Petition should be denied.

ARGUMENT

The Petition for Writ of Certiorari should be denied because: The questions decided by the state court of appeals had been previously settled by this Court and the court of appeal's decision is in harmony with the prior decisions of this Court.

Two decisions of this Court are dispositive of the issues presented below. They are: Serbian Eastern Orthodox Diocese of the United States of America and Canada et al. v. Milivoje-vich et al., 426 U.S. 696 (1976) and Jones v. Wolf, 443 U.S. 595 (1979).

In Serbian, this Court restated a long standing principle that ecclesiastical matters, that is, matters of doctrine, form of worship (liturgy), church government (polity), or membership are outside the jurisdiction of civil courts. Indeed, the First and Fourteenth Amendments prohibit civil court interference in such matters.

This Court stated in Serbian, 426 U.S. at pages 708-709:

"Consistently with the First and Fourteenth Amendments '[c]ivil courts do not inquire whether the relevant [hierar-chial] church governing body has power under religious law [to decide such disputes]. . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To

permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.' *Md. and Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring). For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that the civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." (Brackets and ellipses original.)

More succinctly, this Court said in Serbian at pages 721-722,

"Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952), stated that religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'."

In Jones, the issues did not involve liturgy or polity but a dispute over church property. This Court enunciated the so-called "neutral principles approach" to settling property disputes on the basis of (a) the language of deeds, (b) the terms of local church charters, (c) state statutes governing the holding of church property and (d) the provisions of the constitution of the general church concerning property. Jones, supra. at page 603.

In Jones, this Court held that a state may adopt the "neutral principles approach" or a rule of "compulsory deference to religious authority" or "any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual in liturgy of worship or the tenets of faith." Jones, supra, at page 602 (quoting Maryland and Virginia Churches, 396 U.S. at 368).

Thus there are three basic questions to be asked by a court reviewing issues like those presented in this case. (1) Is the issue an ecclesiastical matter, that is, one of church liturgy, polity, membership, etc. or merely a question of the ownership and control of property? If the issue is one of ecclesiastical matters then civil courts have no jurisdiction. If it is merely a property dispute, then the second question is posed. (2) Should the court adopt a rule of compulsory deference to religious authority or apply the "neutral principles approach"?

The rule of deference is a permissible option for the Court and is especially appropriate in dealing with a hierarchical church which, by its form of government, places the ownership and control of property in the ecclesiastical superiors. If the neutral principles approach is adopted by the Court, then the third step of applying the four tests is in order. (3) The subquestions are: (a) what is the language of the deeds? (b) What are the terms of the local church charter? (c) What are the state statutes governing the holding of church property? (d) What are the provisions of the constitution of the general church?

The State Court of Appeals posed each of these three inquiries and, at each fork in the road, moved on to consider both of the options.

Question One: As to the question of whether or not this was an ecclesiastical matter, i.e., one of liturgy or church polity, the state court of appeals noted the Respondents' position that the altars are an essential part of worship and the controversy is purely ecclesiastical. The state court of appeals then stated, "Without actually deciding the same to be true, this Court will consider the case as if it involves a property right." Struempf, supra, at 563.

Thus, rather than decide the case on the basis of ecclesiastical matters, the state court of appeals went on to the second question.

Since the decision of the state court of appeals reversing the trial court is correct even if the court had relied solely on the ecclesiastical matters basis, we shall digress briefly to point this out because this basis was not discussed in the state court's opinion.

Altars have been the center of worship for many religious groups, from the most primitive pagan rites to the most current religious groups. The altar is the center of religious worship for many sects of Christians, Jews, Moslems, Buddhists and others.

It is around the altar that the Catholic community celebrates the mystery of the Eucharist (Holy Mass, the Lord's Supper).

"'The altar of sacrifice should be placed and constructed so that it is always seen to be the sign of Christ himself, the place at which the saving mysteries are carried out and the center of the assembly, to which the greatest reverence is due.' . . . 'The altar, where the sacrifice of Christ is made present under sacramental sign, is always the table of the Lord. People of God are called together to share in this table. Thus, the altar is a center of the thanksgiving accomplished in the eucharist.' . . . 'The altar should remind us that the Mass . . . is at the same time and inseparably a

sacrifice, in which the sacrifice of the cross is perpetuated; a memorial of the death and resurrection of the Lord; and a sacred banquet in which through the Communion of the body and blood of the Lord the people of God share the benefits of the pascal meal, renew the new covenant which God has made with men once for all through the blood of Christ and in faith and hope foreshadow and anticipate the eschatological banquet in the kingdom of the Father, proclaiming the Lord's death until his coming.'

. . . 'Thus, the altar is both a symbol of Christ in the midst of his assembled people and the place of sacrifice. As such, its very position and construction should immediately attract the attention of the faithful who enter the edifice.'

THUS WE HAVE THE MEANING OF THE UNITY AND CENTRALITY OF THE ONE ALTAR OF SACRIFICE IN EACH CHURCH. TWO OR MORE ALTARS, EVEN SIDE ALTARS, CAN ATTRACT, DISTRACT, OR TAKE AWAY FROM THIS VERY BASIC LITURGICAL CONCEPT AND MEANING." (Dfs. Exh. K, "Guidelines for Building or Renovating Churches," p. 5, paragraph 26, Underlining and caps original.)

Nearly every detail of the Eucharistic celebration around the Altar is covered by Church liturgical directives.

The issue is not the ownership or possession of the altars or reredos, but how the Sanctuary of Holy Family Catholic Church will be arranged for worship. Even if the Petitioners' brought their own altar to church each Sunday, they could not through a civil court compel the use of that altar in the liturgy.

The Catholic Church, through its hierarchy, has made the liturgical decision to arrange churches so as to center the focus of attention on one Altar of Sacrifice and to remove or modify things which distract from the full participation of the people on the celebration of the Eucharist. For a civil court to substitute its or the Petitioners' judgment as to the arrangement of the Sanctuary would be to play Bishop, to usurp directly the authority of the hierarchy over liturgical matters and to trample on Free Exercise of Religion.

Had the state court of appeals reversed the judgment of the trial court on the grounds that arrangement of the altars in the Sanctuary of Holy Family Church was an ecclesiastical matter, then such decision would have been fully in accord with this Court's prior decisions.

Question Two: However, the state court of appeals moved to the second question and concluded that the Catholic Church is hierarchial and that title and control of property is vested in the hierarchy and therefore the rule of deference to the established structure

and polity of a hierarchial church was appropriately applicable. The court relied upon a rule long established in Missouri, Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S.W. 1171 (1909). See Struempf, supra, pages 564 to 566. This decision was in accord with this Court's decisions in Serbian and Jones.

Question Three: Again the state court of appeals gave Petitioners the benefit of the doubt and went on and considered the application to this case of the "neutral principles approach" as developed in Jones.

(a) The deeds in the record grant fee simple title to the Bishop and his successors in office without restriction, reservation or trust limitations.

(b) Holy Family Church has no local charter. (In a purely hierarchial church, the parish does not have autonomy.) If one considers the Parish Council's Articles and By-Laws as a charter, they expressly recognize that the governing authority is in the pastor and the bishop, not the Council which is merely advisory. (Dfs. Exh. A).

(c) There are no Missouri statutes governing the holding of church property.

(d) The Canon Laws of the Catholic Church clearly place supreme authority over both temporal (worldly) and spiritual matters in the Bishop. (Dfs. Exh. C, Canon Laws).

Having concluded its consideration of the "neutral principles approach", the state court of appeals stated, "...scrutiny of the documents in purely secular terms provides no basis for finding any control of that property to be vested in the parishioners. Such scrutiny of the Canons offered in evidence clearly reveals that the property is held subject to the control of the hierarchy of the church." Struempf, supra, at page 567. Thus, the State Court doubly complied with the rulings of Jones.

It should be briefly noted that Petitioners, on a number of occasions in their Petition, used terms such as "arbitrary or fraudulent" (e.g. Petition, page 12) obviously with the intent to mislead this Court by implication that some action of the Respondent was arbitrary or fraudulent. Such implication, whether intentional or negligent, is not only totally devoid of fact but outrageous.

The decisions of the Bishop to remove the reredos from the side altar and otherwise rearrange the Sanctuary of Holy Family Church for the celebration of liturgy was made entirely in accord with the laws and regulations of the Catholic Church. (Note the documents quoted above.) Petitioners simply oppose the changes in liturgical practice of the Catholic Church.

Whenever any organization makes changes, there are some who agree and others who disagree. Petitioners obviously disagree with the liturgical

decisions of the Bishop and Pastor as to their parish church and want to control such decisions themselves in the future. One may have understanding for their feelings, but for a civil court to enforce their liturgical preferences in contradiction to ecclesiastical constitutions and decisions of church leaders would be to salve Petitioners' feelings at the price of trampling upon the Free Exercise of Religion.

CONCLUSION

Therefore, Respondent submits that the Petition for Writ of Certiorari should be denied because the decision of the state court of appeals was in harmony with the settled legal principles enunciated by this Court in Serbian and Jones.

Respectfully submitted,

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